JURISDICTIONAL STATEMENT

Appellant John Baucom has commenced claims of age discrimination under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §§ 612-634e, and the Minnesota Human Rights Act ("MHRA"), Minn. Stat. §§ 363A.01 *et seq*. Appellant has alleged violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112 *et seq*, and the MHRA. He is now appealing from an order of the United States District Court, District of Minnesota, the Honorable David S. Doty presiding, filed on January 5, 2005, entering summary judgment in favor of Appellees Holiday Companies and Holiday Stationstores, Inc. The district court had jurisdiction over this matter under 28 U.S.C. §§ 1331 and 1343. This Court retains jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Did the district court err in finding, as a matter of law, that evidence of Appellant's reduced working hours did not constitute an adverse employment action giving rise to a material change in the terms or conditions of his employment in violation of the ADEA, ADA, and MHRA?

Most apposite cases:

Griffith v. City of Des Moines, et al., 387 F.3d 733, 735 (8th Cir. 2004)

Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1016 (8th Cir. 1999)

Davis v. City of Sioux City, 115 F.3d 1365, 1369 (8th Cir.1997)

II. Did the district court err in finding, as a matter of law, that Appellant's numerous correction notices did not constitute any adverse employment action giving rise to a material change in the terms or conditions of his employment in violation of the ADEA, ADA, and MHRA?

Most apposite cases:

Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1016 (8th Cir. 1999)

Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997)

III. Did the District Court err in finding, as a matter of law, that Appellant failed to demonstrate any adverse employment action giving rise to a material change in the terms or conditions of his employment as required to establish a *prima facie* case of retaliation under the ADEA, ADA, and MHRA?

Most apposite cases:

Rothmeier v. Investment Adviser, Inc., 85 F.3d 1328, 1336-1337 (8th Cir. 1996)

Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997)

STATEMENT OF THE CASE

Appellant John D. Baucom, Jr., ("Baucom") is a 68-year-old man who, for the past four years, has endured a continuing effort by his employer to end his employment. Mr. Baucom has endured reduction in hours, demotions, and discipline not given to younger employees, while experiencing verbal harassment from his superiors who told him he is "too old," "a hindrance," and "slow" and unfavorably compared Mr. Baucom to a superior's dead grandmother. At the same time Mr. Baucom learned about his employer's plan to force him to quit. As a result of this treatment, Mr. Baucom commenced the present action. Appellees Holiday Companies and Holiday Stationstores, Inc., ("Holiday") brought a motion for summary judgment before the district court. The district court granted the motion on all of Appellant's claims. Mr. Baucom appeals the entry of summary judgment.[1]

STATEMENT OF THE FACTS

Baucom began his employment with Holiday in November 1999. (Joint Appendix at 242.)[2] His initial hourly wage was $7.00 per hour. (A. 243.) Baucom is a 68-year-old man who suffers from chronic back problems and a degenerative heart condition. (A. 190 ¶ 2.) His medical ailments include a degenerative heart

[1] Baucom is not appealing the district court's summary judgment order on his claim of a hostile work environment.

[2] Hereinafter all citations to the Joint Appendix will be cited as A. and the relevant page number.

disease (A. 219.) His back condition consists of painful, chronic, inflamed arthritis due to damage to three disks in his back. (A.220.) This back condition restricts the speed at which Baucom can move, as his leg muscles become tight. (Id.) Baucom tries to control the pain through medication and therapy. (A. 215, 217.)

In April 2000, Baucom suffered a heart attack while working the nightshift at Holiday. (A. 218, 244.) He subsequently underwent quadruple bypass surgery and had a pacemaker installed. (A. 218-219.) In late October 2000, Baucom presented Holiday with a note from his physician, dated October 23, 2000, restricting Baucom from working more than 9 hours per day and lifting more than 20 pounds. (A. 245.)

On November 17, 2000, Baucom learned he would be demoted from assistant manager to a sales associate at the store because he had told his manager his medical condition would not permit him to work a double shift of 17 hours. (A. 225, 238-239.) Baucom also was re-assigned to another Holiday's store in Minnesota. (A. 239.) When he asked about his demotion, Baucom's manager told him that that in order to be an assistant manager he would have to stand at the register for nine hours. (A. 240.) Baucom's manager was told him that she did not believe he could fulfill the job requirement, and, therefore, he could no longer be an assistant manager. (Id.) Baucom's occurred on December 4, 2000. (A. 190 ¶ 3.)

In January 2001, Baucom complained to his district manager, Bill Youngs ("Youngs"), about the demotion. (A. 190. ¶ 4.) At the same time, Baucom's duties became more physically demanding, which made it more difficult to perform his job. (A. 190 ¶ 5; 234-235.) Baucom received two written disciplinary notices shortly after his complaint to Youngs. (A. 4; 23; 246.) First, on January 27, 2001, Holiday gave Baucom a Corrective Action Notice for allegedly not locking an entrance door when he closed the store. (A. 246.) Youngs told Baucom's manager, Jeannie Francis ("Francis"), to demote Baucom to a sales associate. (A. 191. ¶ 6.) However, a review of Holiday's security tape revealed that Baucom had locked the door, after which Youngs' wife (also an employee of Holiday) unlocked the door to re-enter the store. (A. 247-253.) After viewing the tape, Youngs told Francis to put Baucom's demotion "on the back burner for the time being," and instructed Francis to gather "additional reports" about Baucom so Holiday could remove his assistant manager duties. (A. 248; 254.)

Holiday issued Baucom a second Corrective Action Notice on or about February 11, 2001, for allegedly not completing every item on his weekly work list. (A.4; A.23.) However, Baucom had completed most of the items on the list, but was unable to complete all items because service he had provided to several customers. (A. 191. ¶ 7.) In this Corrective Action Notice Holiday assured Baucom he would receive two weeks of assistant manager training after securing a

note from his physician about his work restrictions. (A. 273.) Holiday, however, did not provide Baucom with the two weeks of training as promised. Instead, Baucom only received about two days of training. (Id.)

On February 20, 2001, Baucom's physician provided Baucom with a note recommending that he not work more than three consecutive days. (A. 255.) Baucom delivered the note to Holiday. (A. 255-257.) After receiving the note, Holiday continued to schedule Baucom to work more than three days in a row. (A. 221.)

In the Spring of 2001, Dale Boeckel ("Boeckel") was hired by Holiday to manage the store where Baucom was assigned. (A. 282.) Youngs told Boeckel that Baucom's health was "no good." (A. 286.) Youngs told Boeckel that Baucom was "too old." (Id.) Younges state that one of Boeckel's responsibilities was to terminate Baucom. (A. 286-287.) Youngs also told Boeckel that Youngs believed Baucom could not perform his job because of his health. (A. 289.)

Boeckel then reduced Baucom's hours. (A. 223-224.) Baucom asked Boeckel why he was scheduled for fewer hours. (A. 223.) Baucom told Boeckel it was important not to lose work hours because he needed 43-45 hours per week to pay for his medical bills and for prescriptions. (A. 259.) Boeckel told Baucom that he cut Baucom's hours because Baucom's age and health were a hindrance. (A. 223.) Baucom pointed out that a reduction to 36 hours or fewer hours per

week would remove him from the expected hours for assistant managers, and reduce the company benefits to which he was entitled. (A. 225, 241.)

Boeckel admitted that he reduced Baucom's hours because Youngs told him to cut the hours so Baucom would quit. (A. 223; 290-291.) Youngs also told Boeckel that Baucom was "too old and slow" and that "[Baucom] probably would not work all that long anyway." (A. 286; 295.) Youngs told Boeckel that cutting Baucom's hours would be a good start and that if that didn't work, he would find some other way to get rid of Baucom. (A. 290-292.) At the same time, Youngs and Boeckel discussed Baucom's age and health. (A. 223; 288-292.)

Boeckel resigned from Holiday in or around December 2002. (A. 295.) Jay Downing ("Downing") succeeded Boeckel as Baucom's supervisor. (A. 324-325; 327.) Like Boeckel, Downing reported to Youngs. (Id.)

On January 26, 2003, a Sunday, Downing called Baucom's home because he wanted Baucom to work that day. (Baucom Dep. at 140.) Baucom, however, had the day off and was unavailable. (A. 191 ¶ 8.) That Monday, Downing reprimanded Baucom and told him that he needed to know how to reach Baucom on his days off. (A. 258.) Baucom told Downing that if he had worked Sunday, it would have put him over the three-day limit prescribed by his physician. (Id.) Downing responded by saying that Downing would determine Baucom's work schedule, no one else. (Id; A. 258.)

On February 3, 2003, Downing yelled at Baucom, stating, "You are a slow old man. My grandmother can move faster than you and she has been dead for over seven years." (A. 222-223.) Later that same day, Baucom overheard Downing speaking to Holiday's employees Corey Howl ("Howl") and Tracy Peters ("Peters") on how Downing had forced another employee to quit by scheduling the same employee to work one hour per day for seven days a week. (A. 230-231.) Downing also said it took the employee four weeks to catch on before he quit. (A. 231.) Downing then said he would find a way to terminate Baucom. (Id.) Howl told Downing he could not fire Baucom because of his age or disability. (Id.) Downing replied that somehow he would get Baucom to become insubordinate in order to discipline him. (Id.)

The next day, on February 4, 2003, Downing changed Baucom's schedule from working mornings with Sundays off to working evenings and Saturdays/Sundays. (A. 191-192. ¶ 9.) This new schedule interfered with Baucom's evening physical therapy and reduced the time Baucom's wife could assist him with the therapy. (Id.) Besides scheduling Baucom for more than three days in a row and changing the established schedule, Downing also cut Baucom's hours and gave them to other employees. (Id ; A. 228; 237.)

On or about February 10, 2003, Downing sent Baucom an email scolding him for allegedly "wondering [sic] the store or doing what ever [sic] your [sic]

doing." (A. 193. ¶ 10.) Downing also criticized Baucom's leadership ability for no reason, stating, "We really need to get this fixed, we will not loose [sic] good employee's [sic] because of your lack of leadership!!!1 [sic]." (Id.)

On or about February 12, 2003, Baucom was leaving work for a prescheduled cardiology appointment when Downing told him he could not leave. (A. 192 ¶ 11.) Downing told Baucom that he needed to schedule medical appointments on his days off. (Id.) Baucom then told Downing that he had scheduled the appointment for his day off, but that Downing himself had changed the schedule. (Id.) Regardless, Downing refused to allow Baucom to leave, and Baucom rescheduled his appointment for a week later. (Id.)

On February 14, 2003, Baucom complained to Youngs that he believed he was being harassed because of his age and disability, and complained about the changes to his work schedule. (A. 230-232; 236.) Baucom asked for accommodations relating to his health and an opportunity to return to the morning shift. (A. 237.) Youngs told Baucom that the accommodations would not work. (Id.) Youngs told Baucom that accommodations were not in Baucom's "best interest" and that Baucom was in a "no-win" situation. (Id.)

On or about May 5, 2003, Baucom filed a Charge of Discrimination with Minnesota Department of Human Rights and the Equal Employment Opportunity

Commission ("EEOC") alleging that Holiday was discriminating against him because of his age and disability. (A. 193 ¶15.)

On May 9, 2003, four days after Baucom filed his charge, Holiday presented Baucom with a series of Corrective Action Notices dated February 23, 2003, March 26, 2003, March 27, 2003, and April 17, 2003. (A. 193 ¶ 16; 276.) These notices had previously not been provided to Baucom. (A. 193 ¶ 16.)

On the same day, Holiday told Baucom he had failed a tobacco/alcohol inspection ("sting") and had to undergo remedial training. (A. 193-194; 269-271.) Other employees also failed stings but were not required to undergo the sting remedial training. (A. 269.) Baucom believed he had been the target of at least three of four stings during the previous three weeks. Three of the four undercover purchasers specifically targeted Baucom for the sting by refusing the service of other cashiers. (A. 193-194.) Youngs often called other employees to warn them when a tobacco sting was scheduled, but not Baucom. (A. 277-279.)

Around August 20, 2003, Holiday presented Baucom with another Corrective Action Notice, alleging that Baucom had missed the following days for unknown reasons: February 26, 2003, to February 28, 2003; April 15, 2003, to April 17, 2003; and May 21, 2003, to May 23, 2003. (A. 194 ¶ 22.) Contrary to the Corrective Action Notice, Baucom had provided Holiday with physician's slips for each of his absences. (Id.)

On October 13, 2003, Baucom served Holiday with his Complaint initiating this lawsuit. (A. 196 ¶ 26.) In November 2003, Downing provided Baucom with a performance review for the period of November 10, 2002, through November 10, 2003. (A. 195-196.) Downing scored Baucom as "below standard," restating several of the events earlier in the year for which Baucom was reprimanded. (Id.) Following the review, Holiday placed Baucom on a 60-day "performance improvement plan" and told him that he would be subject to "further disciplinary action. . . up to and including termination of employment." (A. 309-311.) Holiday also refused to increase Baucom's wage. (Id.)

On January 30, 2004, Baucom filed and served his first amended complaint. (A.1-19.) Holiday answered on February 26, 2004. (A. 20-24.) On July 6, 2004, Holiday moved for summary judgment on Appellant's claims. (A. 35.) On January 5, 2005, the district court granted Holiday's motion. (A. 386.) Baucom filed a timely notice of Appeal on February 2, 2005. (A. 399.)

SUMMARY OF THE ARGUMENT

The district court concluded that Baucom failed to produce evidence demonstrating that he had been subjected to an adverse employment action. In doing so, the district court ignored the overwhelming evidence that Baucom's hours, and consequently his pay, had been reduced. The court also ignored, or refused to view the evidence in a light most favorable to Baucom. However, at summary judgment, a district court must give all reasonable inferences to the nonmoving party. Anderson v. Liberty Lobby, Inc., 447 U.S. 242, 247 (1986); see also Newton v. Caldwell Laboratories, 156 F.3d 880, 881 (8th Cir. 1998). Instead, the district court accepted Holiday's version of the facts and failed to grant Baucom all reasonable inferences. Had the district court done so, Baucom's claims could not have been dismissed on summary judgment. There is sufficient evidence demonstrating that Baucom was subjected to adverse employment actions because of his age and disability. Summary judgment must be reversed.

ARGUMENT

I. STANDARD OF REVIEW.

The district court's grant of summary judgment is to be reviewed *de novo*, viewing the record in the light most favorable to Baucom, and giving him the benefit of all reasonable inferences. EEOC v. Liberal R-II School District, 314 F.3d 920, 922 (8th Cir. 2002) (citing Keathley v. Ameritech Corp., 187 F.3d 915, 919 (8th Cir. 1999)).

Pursuant to Federal Rule of Civil Procedure 56(c), when a party moves for summary judgment:

> [t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c) (2002). Under this framework, the moving party bears the initial burden of producing sufficient evidence to establish that there are no genuine issues of material fact such that the moving party is entitled to judgment as a matter of law. Celotex Corp. v. C. Catrett, 477 U.S. 317, 322 (1986). If the moving party satisfies its burden, the burden of going forward shifts to the non-moving party to produce evidence that results in a conflict of material fact to be resolved by a jury. In arriving at a resolution, the court must construe the evidence—and grant all reasonable inferences—in favor of the non-moving party.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986); see also Newton v. Caldwell Laboratories, 156 F.3d 880, 881 (8th Cir. 1998). The moving party must establish its right to judgment with such clarity that there is no room for controversy. Jewson v. Mayo Clinic, 691 F.2d 405, 408 (8th Cir. 1982). "At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter." Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1376-77 (8th Cir. 1996). Because discrimination cases often turn on inferences rather than on direct evidence, the court is to be particularly deferential to the nonmovant. EEOC v. Woodbridge Corp., 263 F.3d 812, 814 (8th Cir 2001). Indeed, this Court has counseled that summary judgment is appropriate only in "those rare instances where there is no dispute of fact and where there exists only one conclusion." Johnson v. Minnesota Historical Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991).

The issue at summary judgment is not whether a plaintiff successfully convinces the court that he was discriminated against; rather, it is whether a dispute of material fact exists. Johnson, 941 F.2d at 1244. The United States Supreme Court has noted "There will seldom be 'eyewitness' testimony as to the employer's mental processes." United States Postal Service Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983). Accordingly, the 8th Circuit has cautioned that summary judgment should seldom be granted in discrimination cases. Bassett v.

City of Minneapolis, 211 F.3d 1097, 1099 (8th Cir. 2000); Lynn v. Deaconess Med. Ctr.-West Campus, 160 F.3d 484, 486 (8th Cir. 1998); Smith v. St. Louis University, 109 F.3d 1261, 1264 (8th Cir. 1997); Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994). Moreover, at the summary judgment stage in employment discrimination cases, as here, the issue is whether the plaintiff has sufficient evidence that unlawful discrimination was *a* motivating factor in the defendant's adverse employment action. Griffith v. City of Des Moines, et al., 387 F.3d 733, 735 (8th Cir. 2004) (emphasis in original). If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment. Id.

In granting summary judgment, the district court in this case made one significant ruling challenged here. The court concluded that Baucom's claims failed because he had not suffered an adverse employment action. This conclusion was both legally and factually wrong. Baucom provided more than ample evidence to create, at a minimum, a genuine issue of fact as to whether he had suffered an adverse employment action.

II. THE DISTRICT COURT ERRED IN HOLDING THAT BAUCOM DID NOT SUFFER AN ADVERSE EMPLOYMENT ACTION.

A. Age Discrimination under the ADEA and MHRA.

At the summary judgment, the issue is whether a plaintiff has offered sufficient evidence that unlawful discrimination was *a* motivating factor in the

defendant's adverse employment action. Griffith, 387 F.3d 735. "If so, the presence of additional legitimate motives will not entitle the defendant to summary judgment." Id. (emphasis in original).

The ADEA and the MHRA make it unlawful for employers to discriminate against employees with respect to their "terms, conditions, or privileges of employment" on the basis of age. 29 U.S.C. § 623(a)(1); Minn. Stat. § 363A.09. While the ADEA protects individuals over the age of 40, the MHRA defines the protected group with respect to age as any person "over the age of majority", i.e., 18 years old. Compare 29 U.S.C. § 631(a); Minn. Stat. § 363A.03 Subd. 2. Despite the difference in the definition of the protected class, courts use the same analysis for ADEA and MHRA claims. Bevan v. Honeywell, Inc., 118 F.3d 603, 613 (8th Cir. 1997) (explaining "[w]e review the MHRA claim under the same standards as we applied to the ADEA claim").

When analyzing age discrimination claims, courts use the familiar McDonnell Douglas test. See Yates v. Rexton, Inc., 267 F.3d 793, 799 (8th Cir. 2001). The first step of the test requires the plaintiff to present a *prima facie* case of employment discrimination. Id. This means Baucom must demonstrate that: 1) he is a member of a protected class; 2) he was qualified to perform his job; 3) he suffered an adverse employment action; and 4) that action occurred in circumstances giving rise to an inference of discriminatory motivation. McDonnell

Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973); Kneibert v. Thomson Newspapers, Michigan Inc., 129 F.3d 444, 451 n.4 (8th Cir. 1997) (applying the McDonnell Douglas test to the ADEA). Presentation of a *prima facie* case creates a legal presumption of unlawful discrimination. Ryther v. KARE 11, 108 F.3d 832, 836 (8th Cir. 1997).

This presumption requires the employer to produce evidence of a legitimate, nondiscriminatory reason for the adverse employment action. Id. If the employer carries this burden, the plaintiff must present evidence that creates a question of material fact as to whether the employer's proffered reasons are pretextual and creates a reasonable inference that age was a determinative factor in the adverse employment decision. Hindman v. Transkrit Corp., 145 F.3d 986, 990 (8th Cir. 1998.) Disbelief of the employer's reasons may suffice to show intentional discrimination. Ryther, 108 F.3d at 836. Therefore, rejection of the proffered reasons will permit the trier of fact to infer the "the ultimate fact of intentional discrimination, and ... no additional proof of discrimination is required." Id. The employee may rely on the same evidence establishing a *prima facie* case to show pretext. Id. at 836-837. A plaintiff's *prima facie* case, combined with sufficient evidence to find that an employer's proffered reason for the adverse action is false, may permit the finder of fact to conclude that the employer engaged in unlawful

discrimination. Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 148 (2000).

The McDonnell Douglas standard is flexible. Hindman 145 F.3d at 990. As discussed by the Supreme Court, the test is simply a useful yardstick, which is neither "rigid" nor "mechanized." McDonnell Douglas, 411 U.S. at 802, n.13; Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978). Rather, the primary focus is always on whether an employer treats an employee less favorably than other employees for an impermissible reason. Furnco 438 U.S. at 577.

There is no dispute that Baucom is a member of the protected class or qualified to perform his job. See A. 49. However, the district court erred in holding that Baucom failed to raise questions of material fact as to whether he had suffered an adverse employment action.

1. Baucom has suffered adverse employment actions.

Baucom can establish that he was subjected to adverse employment actions and has provided evidence of a discriminatory motive behind that action. Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1016 (8th Cir. 1999). In describing this element of a plaintiff's *prima facie* case, this Court has stated:

> The adverse employment action must be one that produces a material employment disadvantage. Termination, **cuts in pay** or benefits, and **changes that affect an employee's future career prospects** are significant enough to meet the standard, as would circumstances amounting to a constructive discharge.

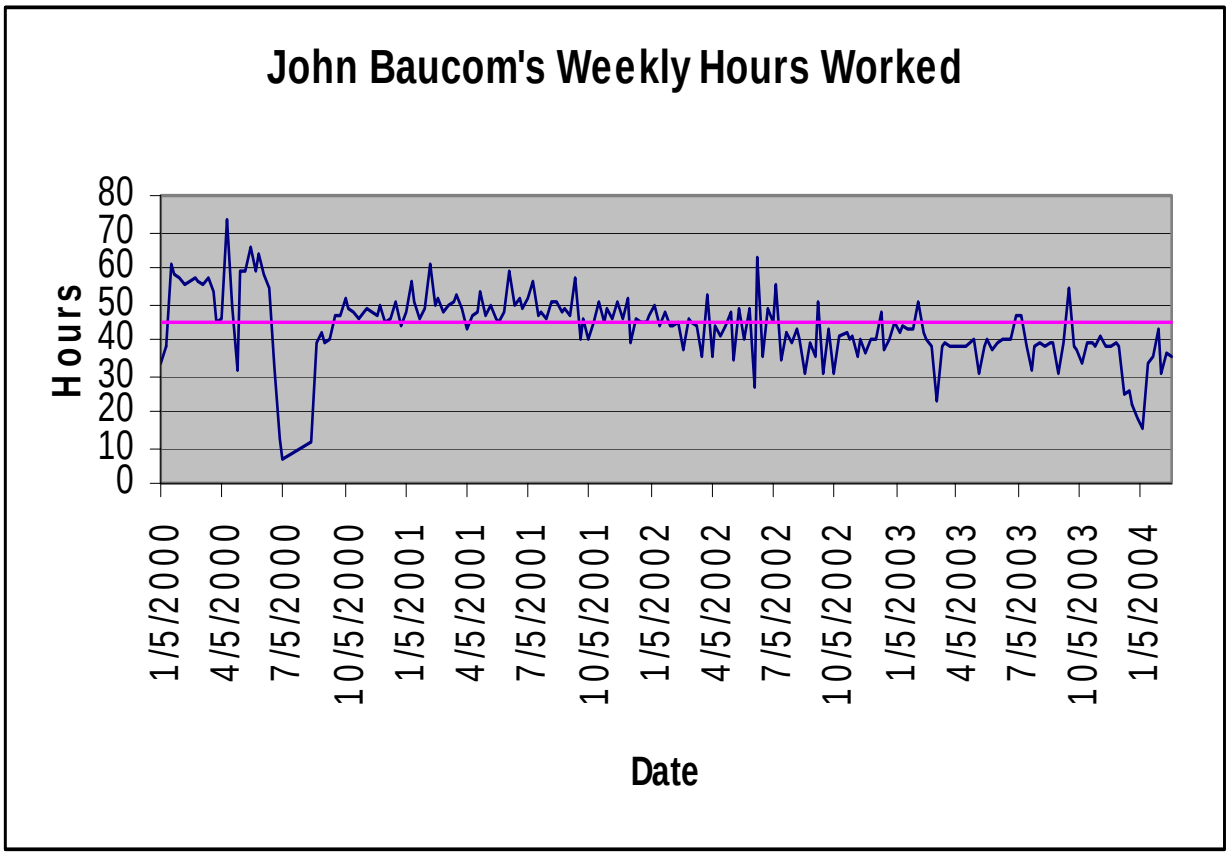
Kerns, 178 F.3d at 1016-17 (emphasis added).

Holiday's adverse employment action is demonstrated by the following: 1) Holiday reduced Baucom's hours, effectively cutting his pay, and then refused to give him a raise; 2) Holiday curtailed Baucom's advancement prospects by demoting him from his assistant manager position to a sales associate position; 3) Holiday limited Baucom's future career prospects by disciplining him and threatening termination; and 4) Holiday treated Baucom differently and less favorably than younger employees.

In reaching its conclusion that Baucom had not been subjected to an adverse employment action, the district court ignored that an adverse action is an issue of fact for a jury to decide. See Kim v. Nash Finch Co., 123 F.3d 1046, 1061-62 (8th Cir. 1997); Davis v. City of Sioux City, 115 F.3d 1365, 1369 (8th Cir. 1997).

The district court's holding is troubling because, while the court acknowledged that Baucom's hours were reduced, the district court did not find the reduction to be a material change. The district court did not explain how a reduction in hours, with its corresponding reduction in earnings, is not material. The court apparently ignored that Boeckel testified that he cut Baucom's hours by nearly ten hours per week. The court also ignored that the hours cut were hours for which Baucom was paid overtime rather than straight time. (A. 225.) Moreover,

Holiday's own records confirm that Baucom's hours were reduced. The chart below reflects the reduction of hours:



As the chart reflects,[3] Baucom's hours began to decrease from the range of 43-45 hours per week to fewer than 40 hours per week by April of 2002. This reduction in hours continued, with minor exceptions, through 2004. Whereas Baucom consistently worked in excess of 40 hours per week prior to 2002, he now consistently works less than 40 hours per week. Baucom's loss of hours reflects a loss in excess of 20% of his previous average. It cannot be seriously argued that a 20% loss in pay is not a material loss.

[3] The chart is also found at A. 199.

Additionally, the chart corroborates Boeckel's testimony that he cut Baucom's hours in 2002 when Youngs directed him to do so. (A. 223; 290-291.) The chart also demonstrates that in January 2003, after Downing became Baucom's manager, Baucom's hours continued to decrease, supporting Baucom's testimony that Downing further cut his hours. (A. 192 ¶ 9; 193 ¶ 14.) Viewing Baucom's loss of hours and pay in a light most favorable to him, a reasonable jury could easily conclude that the reduction in scheduled hours and a loss of overtime pay was an adverse employment action. Therefore, summary judgment was inappropriate and the district court's decision should be reversed.

Baucom also suffered an adverse employment action by being disciplined and being given poor performance reviews. Employment decisions that affect an employee's future career prospects are sufficient to constitute an adverse employment action. Kerns, 178 F.3d at 1016-17. Here, Baucom received written disciplinary warnings for finding replacements on short notice. (A. 276; 304-307.) Interestingly, other younger employees who did the same received no such warnings. Id. Baucom was disciplined for alleged cash shortages, while younger employees who also had such shortages were not. (A. 274-275.) Baucom was not warned of tobacco stings, while younger employees were warned. (A. 277-279.) Additionally, in November 2003, Baucom was given a performance review for the period of November 10, 2002, through November 10, 2003. (A. 195-196 ¶ 27.)

Baucom was rated "below standard." (Id.) Following the appraisal, Holiday placed Baucom on a 60-day "performance improvement plan" and told him that he would be subject to "further disciplinary action. . . up to and including termination of employment." (A. 312-314.) Holiday refused to increase Baucom's wage. (Id.)

Holiday's disciplinary notices, poor review, refusal to increase Baucom's wage, and its threats of termination clearly create a reasonable inference that Baucom's future prospects with Holiday are not bright. This inference is reinforced by the fact that Baucom's superiors considered Baucom "too old and slow" and that "[Baucom] probably would not work all that long anyway." (A. 286; 295.)

Considering the evidence in the light most favorable to Baucom, and giving him the benefit of all reasonable inferences, Baucom has shown that he was subject to adverse employment actions. Baucom requests that the district court's order granting summary judgment be reversed.

2. Baucom has produced evidence of age discrimination.

Once a plaintiff has established that he was subject to an adverse employment action, the plaintiff must demonstrate that age was a motivating factor for any employment practice even though other factors also motivated the practice. Griffith, 387 F.3d 735. To demonstrate this, Baucom may use any form of evidence. Desert Palace v. Costa, 539 U.S. 90, 100 (2003).

Here, Baucom has presented sufficient evidence to demonstrate Holiday's discriminatory animus. As discussed above, Baucom was perceived as "old" and "slow" and unfavorably compared to a supervisor's dead grandmother. These same supervisors are responsible for determining how many hours Baucom works, whether he is disciplined, and preparing Baucom's performance reviews. This evidence is more than sufficient for a fact finder to infer that Holiday acted with a discriminatory animus towards Baucom. Therefore, summary judgment is inappropriate.

3. Baucom has presented sufficient evidence to Holiday's nondiscriminatory explanation.

If the elements of a *prima facie* case are present, and there is sufficient evidence for a reasonable jury to reject the defendant's proffered reasons for its actions, then the evidence is sufficient to allow the jury to determine whether intentional discrimination has occurred. Gaworski v. ITT Commercial Fin. Corp., 17 F.3d 1104, 1109 (8th Cir. 1994). A plaintiff "may overcome summary judgment by producing evidence that, if believed, would allow a reasonable jury to reject the defendant's proffered reasons for its actions." Korbrin v. University of Minn., 34 F.3d 698, 703 (8th Cir. 1994). That evidence need not directly contradict or disprove the defendant's articulated reason for its actions. Hossaini v. Western Missouri Med. Ctr., 97 F.3d 1085, 1088 (8th Cir. 1996); Davenport v. Riverview Gardens Sch. Dist., 30 F.3d 940, 945 n.8 (8th Cir. 1994). A plaintiff can rely on

evidence offered to establish his *prima facie* case to demonstrate discriminatory motive. Hossaini, 97 F. at 1089 (citations omitted). Evidence of statements made by decision-makers may be evidence of pretext, sufficient to overcome summary judgment. See Hossaini, 97 F.3d at 1089 (holding reasonable person could infer pretext based on plaintiff's evidence of derogatory statements by supervisor); Williams v. Valentec Kisco, Inc., 964 F.2d 723, 728 (8th Cir. 1992) (holding employer's statement referring to employee as "old man" sufficient to prove pretext).

Here, Baucom has established that Youngs directed Baucom's manager, Boeckel, to cut Baucom's hours because he was too "old and slow" and would not be with the company long. Baucom also presented facts that Downing, Baucom's supervisor following Boeckel, told Baucom, "You are a slow old man. My grandmother can move faster than you and she has been dead for over seven years." Finally, Baucom has presented facts that he overheard Downing telling another employee that he wanted to terminate Baucom's employment because of his age and disability. These facts, when viewed in the light most favorable to Baucom, demonstrate that Baucom's supervisors unlawfully used his age as a motivating factor Holiday made employment decisions concerning Baucom's employment. Based upon this evidence, a factfinder could conclude that the

reasons given for termination were pretextual. As such, summary judgment is inappropriate.

B. Disability Discrimination under the ADA and MHRA.

To establish a *prima facie* case of disability discrimination, Baucom must show: 1) that he was a disabled person within the meaning of the relevant statute; 2) that he was qualified to perform the essential functions of the job; and 3) that he suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination. Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir. 1997) (citations omitted). The MHRA is analyzed similarly to the ADA. Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675, 678 n. 3 (8th Cir. 2001).

While there are similarities between the MHRA and the ADA, there are also differences. The key difference is in the definition of disability. Minnesota Statutes, in part, define "disabled person" as "anyone who has a physical, sensory, or mental impairment which **materially** limits one or more major life activities." Minn. Stat. §363A.03 Subd. 12 (emphasis added). Conversely, the ADA defines a "disabled person" as "anyone who has a physical, sensory, or mental impairment which **substantially** limits one or more major life activities." 42 U.S.C. §12102(2)(A) (emphasis added).

At one time, the MHRA's definition of disability required that a physical impairment "substantially" limit one or more major life activities before it would constitute a disability. See Sigurdson v. Carl Bolander & Sons, Co., 532 N.W. 2d 225, 228 n.3 (Minn. 1995). However, in 1989, the Minnesota legislature changed the definition of disability from requiring a "substantial" limitation to requiring only a "material" limitation of one or more major life activity. Act of May 25, 1989, ch. 280, §1, 1989 Minn. Laws 1099, 1100. This amendment was a legislative reaction to the Minnesota Supreme Court's restrictive interpretation of "substantially limited" in State by Cooper v. Hennepin County, 441 N.W. 2d 106, 109 (Minn. 1989). See Sigurdson, 532 N.W. 2d at 228. Consequently, the 1989 amendment made the state law definition "**different from and less stringent than the federal definition of a disability**," and therefore is intended to encompass a broader range of disabilities and more individuals than the ADA. Hoover v. Norwest Private Mortg. Banking, 632 N.W. 2d 534, 543 (Minn. 2001) (emphasis added); Sigurdson, 532 N.W. at 228. The Eighth Circuit also recognized this difference. See Kammueller v. Lomis, Fargo & Co., 383 F.3d 779 (8th Cir. 2004).

In order to establish a *prima facie* case on claims of disability discrimination, Baucom must show: 1) that he was a disabled person within the meaning of the relevant statute; 2) that he was qualified to perform the essential functions of the job; and 3) that he suffered an adverse employment action under

circumstances giving rise to an inference of unlawful discrimination. Miners v. Cargill Communications, Inc., 113 F.3d 820 (8th Cir. 1997) (citations omitted).

The district court determined that Baucom had not suffered an adverse employment action and, as such, failed to establish a *prima facie* case. For the reasons explained below, Baucom submits that the district court was incorrect and that he has established a *prima facie* case under the ADA and MHRA.

1. Baucom is disabled as a matter of law.

The ADA offers several definitions of "disability," including "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual. . ." 42 U.S.C. § 12102(2)(A). As guidance, the EEOC has identified a number of major life activities, "such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R §1630.2(i). The 8th Circuit has expanded upon this non-exhaustive list, including "sitting, standing, lifting, and reaching." Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 948 (8th Cir. 1999).

Baucom has heart disease. (A. 190 ¶ 2.) This disease is an impairment that, if it substantially limits a major life activity, may constitute a disability. Taylor v. Nimock's Oil Co., 214 F.3d 957, 960 (8th Cir. 2000). A back condition that limits one's ability to walk, stand, twist, bend, and lift can constitute a disability that substantially limits one or more major life activities. Webner v. Titan Distribution,

Inc., 267 F.3d 828, 833-34 (8th Cir. 2001) (holding evidence sufficient to present to jury, affirming jury's decision in favor of a plaintiff with bad back and lifting restriction).

Baucom's medical condition materially limits his ability to work as well as to lift, walk, and perform other manual tasks, and he has experienced severe restrictions on his ability to perform these tasks, including the limited work schedule and the 20-pound lifting restriction. (A. 214-215; 217-220.) As such, Baucom is disabled under the relevant statutes.

2. Baucom has experienced adverse employment actions.

As discussed above, Baucom has endured various adverse employment actions. A reasonable jury could infer that Baucom's disability was Holiday's motivating factor for taking such actions. Baucom's superiors, Youngs and Downing, made comments regarding Baucom's health status. Youngs told Boeckel to cut Baucom's hours because he was "slow" (A. 286; 295) and his health was a "hindrance" to Holiday. (A. 223; 288-292.) Downing told a coworker he was going to find a way to get Baucom to quit since he could not fire him based on his disability. (A. 229-231.) Also, prior to these events, Baucom was demoted for a period of time after his supervisor told Baucom she believed he could not stand at the register for nine hours, thereby precluding him from fulfilling his

duties as an assistant manager. (A. 226; 238-240.) For these reasons, the district court erred when it granted Holiday's summary judgment motion.

III. GENUINE ISSUES OF MATERIAL FACT EXIST ON BAUCOM'S RETALIATION CLAIMS.

The district court also dismissed Baucom's retaliation claims. The McDonnell Douglas test is followed in retaliation cases. Smith v. Allen Health Sys., Inc., 302 F.3d 827, 832 (8th Cir. 2002). To meet his initial burden, Baucom must show that he: (1) exercised rights under the statute, (2) suffered an adverse employment action, and (3) that there was a causal connection between the two. Id. Here, for the reasons state above, the district court again erred in holding that Baucom was not subject to an adverse employment action.

A. Baucom has Established a *Prima Facie* Case of Retaliation.

There is no legitimate dispute that Baucom engaged in protected activities. Baucom verbally complained of discrimination, filed a charge with the EEOC, and then initiated the present action. As discussed above, Baucom has suffered several adverse employment actions. Moreover, there is a causal connection between the two.

B. Baucom has Offered Ample Evidence that Creates a Reasonable Inference that Exercise of Statutory Rights were Motivating Factors in Holiday's Adverse Employment Decision.

A plaintiff alleging discrimination can avoid summary judgment if the evidence considered *in its entirety* and (1) creates a fact issue as to whether the

employer's proffered reasons are pretextual and (2) creates a reasonable inference that the protected characteristic was a determinative factor in the adverse employment decision. Rothmeier v. Investment Adviser, Inc., 85 F.3d 1328, 1336-1337 (8th Cir. 1996) (emphasis added). A plaintiff need only show that the prohibited characteristic or protected activity was a motivating factor in the adverse employment decision. See Griffith, 387 F.3d 735.

Courts, including this one, have found that periods of time between statutorily protected activity and adverse employment actions longer than three months are sufficient to create an inference of the requisite causal connection. Smith v. Riceland Foods, 151 F.3d 813, 819-20 (8th Cir. 1998); see also Hossaini v. Western Missouri Med. Ctr, 97 F.3d 1085, 1089 (8th Cir. 1996) ("reasonable person could infer a discriminatory motive from the timing" between complaint and adverse action of three months); EEOC v. HBE Corp., 135 F.3d 543 (8th Cir. 1998) ("short interlude" between protected conduct and termination sufficient evidence of causation); Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997) (plaintiff produced sufficient evidence of causation where complaint and adverse employment action were only a few days apart); O'Bryan v. KTIV Television, 64 F.3d 1188, 1193-94 (8th Cir. 1995) (three months between filing administrative complaints and firing established causal connection) see also Potter v. Ernst & Young, L.L.P., 622 N.W. 2d 141, 146 (Minn. Ct. App. 2001) (plaintiff's

termination less than three months after complaint, together with other circumstantial evidence in the record, created a genuine issue of fact concerning the causal connection required to prove reprisal); Thompson v. Campbell, 845 F.Supp. 665, 675 (D. Minn. 1994) (plaintiff's termination four months after filing complaint, together with other circumstantial evidence in the record, raised an issue of material fact concerning the causal connection between protected conduct and termination); Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999) (assuming that temporal proximity of two months and one week is sufficient to support a *prima facie* case of retaliation); Ramirez v. Oklahoma Dept. of Mental Health, 41 F.3d 584, 596 (10th Cir. 1994) (one and one half month period between protected activity and adverse action may, by itself, establish causation); see also Budenz v. Sprint Spectrum, L.P., 230 F. Supp. 2d 1261, 1276-77, (D. Kan. 2002) (warning two months after plaintiff's protected activity established a causal connection sufficient to support *prima facie* case of reprisal discrimination); Alexander v. Gerhardt Enterprises, Inc., 40 F.3d 187, 196-97 (7th Cir. 1994) (adverse action close in time to protected activity is sufficient to establish causal connection).

Here, based on the timing of Holiday's adverse actions directed at Baucom, the fact finder could easily conclude that Baucom's exercise of his statutory rights was a motivating factor in Holiday's actions. Just *days* after the February 14,

2003, meeting and the May 5, 2003, charge of discrimination, Holiday took disciplinary action against Baucom. For example, on May 9, 2003, Baucom was reprimanded and his file "papered" for events occurring weeks before, for which he was unaware. (A. 276.) Also, on May 9, 2003, Baucom was reprimanded for allegedly failing a tobacco sting. (A. 269-271.) Additionally, within weeks of filing his complaint, Baucom was given a poor performance review. (A. 195-196 ¶ 27.) Following the review, Holiday placed Baucom on a 60-day "performance improvement plan" and told him that he would be subject to "further disciplinary action. . . up to and including termination of employment." (A. 309-311.) Holiday the refused to increase Baucom's wage. (Id.)

Holiday made the decision to discipline and threaten Baucom almost simultaneously with his exercise of his statutory rights. A "short interlude" between protected conduct and termination are sufficient evidence of causation. EEOC v. HBE Corp., 135 F.3d 543 (8th Cir. 1998). When a plaintiff presents evidence that the protected activity and the adverse employment action were only a few days apart, that evidence is sufficient to show a causal connection between the two. Kim v. Nash Finch Co., 123 F.3d 1046 (8th Cir. 1997). Certainly, the almost immediate nature of Holiday's actions is sufficient evidence of retaliation. Taken together with all the surrounding circumstances, a jury could conclude that Holiday

intended to punish Baucom for exercising his rights under the ADEA, ADA, and MHRA.

CONCLUSION

The district court erred in holding that Baucom had not been subjected to an adverse employment action. The district court ignored evidence regarding Baucom's employment when it granted summary judgment in favor of Holiday. Genuine issues of material fact preclude summary judgment. For these reasons, Baucom respectfully requests that this Court reverse summary judgment in favor of Holiday.

Date: March 31, 2005 NICHOLS KASTER & ANDERSON,PLLP

J. Page Anderson, # 166194
John A. Fabian, #13482X
Adam A. Gillette #328532
4644 IDS Center
Minneapolis, MN 55402
Telephone: (612) 338-1919

ATTORNEYS FOR APPELLANT